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ZALUKAEVA, TATYANA

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte BRIAN FRANCIS GRAY, KIVOE OHBA, RYO MINOGUCHI,
and KAORU NIIHARA

Appeal 2008-0042
Application 10/089,338
Technology Center 3700

Decided: August 13, 2008

Before TERRY J. OWENS, JOSEPH A. FISCHETTI, and BIBHU R.
MOHANTY, *Administrative Patent Judges*.

FISCHETTI, *Administrative Patent Judge*.

DECISION ON APPEAL
STATEMENT OF THE CASE

Appellants seek our review under 35 U.S.C. § 134 of the Examiner's final rejection of claims 1 and 10. We have jurisdiction under 35 U.S.C. § 6(b) (2002).

SUMMARY OF DECISION

We AFFIRM.

THE INVENTION

Appellants claim an absorbent article having a skin care composition.
(Specification 1: 12-15.)

Claim 1, reproduced below, is representative of the subject matter on appeal.

1. An absorbent article comprising a pair of longitudinal side edges, a liquid pervious topsheet, a liquid impervious backsheet joined to said topsheet, and an absorbent core positioned between said topsheet and said backsheet, said absorbent article comprising:

an oil-based skin care composition provided on at least a portion of said topsheet,

a flap extending laterally outwardly from each longitudinal side edge, said flap comprising a garment surface, said garment surface of said flap comprising a flap adhesive, and

a flap adhesive cover covering said flap adhesive, said flap adhesive cover comprising a barrier sheet to reduce the migration of the skin care composition therethrough, the barrier sheet comprising two surfaces, wherein one surface of the barrier sheet is treated with a composition comprising a component selected from the group consisting of fluorochemicals, hydrophilic polymers, inorganic particles, and mixtures thereof.

THE REJECTION

The Examiner relies upon the following as evidence of unpatentability:

Mizutani	US 5,683,377	Nov. 4, 1997
Hanser	WO 98/42286	Oct. 1, 1998

The following rejections are before us for review.

1. Claims 1 and 10 stand rejected under 35 U.S.C. § 103(a) over Mizutani in view of Hanser.

ISSUE

The issue is whether Appellants have sustained their burden of showing that the Examiner erred in rejecting the claims on appeal as being unpatentable under 35 U.S.C. § 103(a) over Mizutani in view of Hanser.

FINDINGS OF FACT

1. Mizutani discloses that

[s]urfaces of the napkin body 6 and the wings 7 are adjusted to be in contact with pants worn by a user as a result of a pair of first adhesive zones 8 and a pair of second adhesive zones 9, respectively....

The second adhesive zones 9 [(which are analogous to Appellants' flap adhesive)]... located on the respective wings 7 ... are releasably covered and protected with a square or rectangle second release sheet 12, with wings 7 being folded along transversely opposite side edges 17, 18 of the napkin body 6, respectively, onto the topsheet

3. The wrapping sheet 2 has longitudinally opposite end edges 26, 28 and transversely opposite side edges 29, 30 extending outward beyond both the longitudinally opposite end edges

15, 16 and the transversely opposite side edges 17, 18 of the napkin body 6 (See FIG. 3) and fixedly bonded at desired regions, for example, regions A, B, C as indicated in FIG. 2, to an outer surface of the first release sheet 11 by means of hot melt adhesive 20.

(Mizutani, col. 2, ll. 39-58.)

2. Mizutani's Figure 2 illustrates the folded condition of a napkin body 6 similar to that of Appellants' Figure 9 wherein the release sheet 12 (analogous to Appellants' flap adhesive cover) is shown covering the adhesive zones on the wings (analogous to Appellants' flap adhesive 84) (Mizutani, Figure 2).

3. Hanser discloses securing the napkin 20 to the user's undergarment using an adhesive carried on the backsheet 26 and which adhesive layer being further covered with a removable release liner in order to keep the adhesive from drying out or adhering to a surface other than the crotch portion of the undergarment prior to use. (Hanser, p. 16, ll. 10-24.)

4. The topsheet of the absorbent layer in Hanser has a lotion applied to it to reduce the adherence of body exudates to the skin of the wearer thereby improving ease of clean up (Hanser, p. 22, ll. 22-27). The lotion treated topsheet has the protective cover (FF 3) place over it to minimally expose the lotioned top sheet to the atmosphere thereby protecting the top sheet from contaminants. (Hanser, p. 20, ll. 1-8.)

5. Hanser does not disclose a napkin prepackaged in folded form but rather is disclosed as a single plane member (Hanser Fig. 1).

6. The Examiner found:

[o]ne of ordinary skill in the art would have been motivated to modify the article of Mizutani by providing the topsheet with an oil-based

composition and further comprising a barrier sheet treated with silicone and polyvinyl alcohol (PVA), since doing so would reduce the adherence of body exudates to the skin of the wearer and also provide releasable protection for the lotioned topsheet. Thus, it would have been obvious to one of ordinary skill in the art to modify the article of Mizutani by providing the topsheet with an oil-based composition and further comprising a barrier sheet treated with silicone and polyvinyl alcohol (PVA), which would be a selection from the group consisting of fluorochemicals, hydrophilic polymers, inorganic particles, and mixtures thereof, as taught by Hanser, since doing so would reduce the adherence of body exudates to the skin of the wearer and also provide releasable protection for the lotioned topsheet.

(Final Rej. 4-5.)

PRINCIPLES OF LAW

“Section 103 forbids issuance of a patent when ‘the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.’” *KSR Int’l Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1734 (2007). The question of obviousness is resolved on the basis of underlying factual determinations including (1) the scope and content of the prior art, (2) any differences between the claimed subject matter and the prior art, (3) the level of skill in the art, and (4) where in evidence, so-called secondary considerations. *Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966). *See also KSR*, 127 S.Ct. at 1734 (“While the sequence of these

questions might be reordered in any particular case, the [*Graham*] factors continue to define the inquiry that controls.”)

In *KSR*, the Supreme Court emphasized “the need for caution in granting a patent based on the combination of elements found in the prior art,” *id.* at 1739, and discussed circumstances in which a patent might be determined to be obvious. In particular, the Supreme Court emphasized that “the principles laid down in *Graham* reaffirmed the ‘functional approach’ of *Hotchkiss*, 11 How. 248.” *KSR*, 127 S.Ct. at 1739 (citing *Graham*, 383 U.S. at 12 (emphasis added)), and reaffirmed principles based on its precedent that “[t]he combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.” *Id.* The Court explained:

When a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or a different one. If a person of ordinary skill can implement a predictable variation, § 103 likely bars its patentability. For the same reason, if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill.

Id. at 1740. The operative question in this “functional approach” is thus “whether the improvement is more than the predictable use of prior art elements according to their established functions.” *Id.*

The Supreme Court stated that there are “[t]hree cases decided after *Graham* [that] illustrate the application of this doctrine.” *Id.* at 1739. “In

United States v. Adams, ... [t]he Court recognized that when a patent claims a structure already known in the prior art that is altered by the mere substitution of one element for another known in the field, the combination must do more than yield a predictable result.” *Id.* at 1739-40. “*Sakraida and Anderson’s-Black Rock* are illustrative – a court must ask whether the improvement is more than the predictable use of prior art elements according to their established function.” *Id.* at 1740.

The Supreme Court stated that “[f]ollowing these principles may be more difficult in other cases than it is here because the claimed subject matter may involve more than the simple substitution of one known element for another or the mere application of a known technique to a piece of prior art ready for the improvement.” *Id.* The Court explained:

Often, it will be necessary for a court to look to interrelated teachings of multiple patents; the effects of demands known to the design community or present in the marketplace; and the background knowledge possessed by a person having ordinary skill in the art, all in order to determine whether there was an apparent reason to combine the known elements in the fashion claimed by the patent at issue.

Id. at 1740-41. The Court noted that “[t]o facilitate review, this analysis should be made explicit.” *Id.* (citing *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006) (“[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness”)). However, “the analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court

can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.”

ANALYSIS

For the reasons that follow, we sustain the Examiner’s rejection of claim 1. Appellants’ argument likewise fails to demonstrate error in the rejection of claim 10 which Appellant has not argued separately from claim 1. As such, we sustain the rejection of claims 1 and 10.

Appellants argue

[t]he treated protective cover (25), in Hanser, does not cover the flap adhesive, as claimed in Claim 1 of the present application. Rather, the protective cover (25) in Hanser covers the topsheet side of the flaps (52) and the topsheet (24) of the absorbent article. The protective cover (25) does not cover the attachment means (54) (the attachment means in the present application is the flap adhesive 84), Page 4, lines 5-6 of Hanser teaches that the protective cover (25) is releasably attached to both the flaps (52) and to the topsheet upper surface. As shown in Fig. 3 of Hanser, which is a top view of a sanitary napkin, the protective cover (25) covers the topsheet (24) of the sanitary napkin and the topsheet side of the flaps (52), when the flaps (52) are in an unfolded position. The protective cover (25) does not cover the attachment means (54).

(Appeal Br. 6.)

This argument is not well taken because Appellants are attacking the Hanser reference individually when the rejection is based on a combination of references. *See In re Keller*, 642 F.2d 413, 426 (CCPA 1981); *In re Young*, 403 F.2d 754, 757-58 (CCPA 1968). As found *supra* (FF 6), it is Mizutani and not Hanser which discloses the protective cover covering the flap adhesive. This finding is not challenged by Appellants. Appellants however argue that “Mizutani discloses a release sheet on ... the adhesive of the garment facing surface of the wings....” (Appeal Br. 4.) We are not persuaded by this argument because claim 1 only requires that the garment surface of the flap comprise a flap adhesive and we read the surface in Mizutani on which the adhesive 9 is applied as a garment surface because it must attach to either the underwear or the pant of the user, e.g. garments (FF 1).

Any deficiency in Mizutani is made up by Hanser which teaches the use of 1.) an oil-based skin care composition provided on at least a portion of said topsheet, and 2.) the flap adhesive cover comprising a barrier sheet to reduce the migration of the skin care composition therethrough (FF 4). Appellants do not challenge these findings. Thus, contrary to Appellants’ assertions, all elements required by claim 1 are found in the prior art references to Mizutani and Hanser.

Accordingly, Appellants argue

[o]ne skilled in the art would not seek to combine Mizutani and Hanser to solve the problem of preserving the adhesive properties of an adhesive located on the garment facing surface of the wings of an absorbent article because each reference is directed to solving problems that are unrelated to one another. There is no suggestion or motivation

in the reference or to one skilled in the art to
combine the references.

(Appeal Br. 4.)

We disagree with Appellants. A person with ordinary skill in the art would understand from Hanser that applying a lotion to the topsheet of the absorbent layer in Mizutani would reduce the adherence of body exudates to the skin of the wearer thereby improving ease of clean up (FF 3, 6). *See KSR Int’l. Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1741 (2007) (In making the obviousness determination one “can take account of the inferences and creative steps that a person of ordinary skill in the art would employ”). Further the lotion treated topsheet in Mizutani would need a protective cover placed over it to minimally expose the lotioned top sheet to the atmosphere thereby protecting the top sheet from contaminants as taught by Hanser (FF 4). Since in Mizutani the napkin is folded along its length, the cover layer 12 is brought into opposing relationship with the topsheet 3 and the adhesive layer 9 on the flaps (FF 2). In such a condition, it would be obvious to treat the cover layer 12 in Mizutani as claimed to create a protective cover for the lotioned top sheet 3 because in the folded condition the cover layer 12 would be in contact with the top sheet and need to provide a barrier therebetween. Where, as here “[an application] claims a structure already known in the prior art that is altered by the mere substitution of one element for another known in the field, the combination must do more than yield a predictable result,” *KSR*, 127 S.Ct. at 1740 (citing *United States v. Adams*, 383 U.S. 50-51 (1966)).

CONCLUSIONS

We conclude:

We affirm the rejection of claims 1 and 10 under 35 U.S.C. § 103(a) over Mizutani in view of Hanser.

DECISION

The decision of the Examiner to reject claims 1 and 10 is
AFFIRMED.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2007).

AFFIRMED

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